



Completing the Journal Entry: Tips, Tricks, and Trouble

JESSICA DOMME, KANSAS ATTORNEY GENERAL'S OFFICE, KSSC MEMBER

JESSICA GLENDENING, PUBLIC DEFENDER'S OFFICE, KSSC MEMBER

MAY 12TH, 2022



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Completing
the Journal
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once you receive
the PSI?

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defendant's
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- Special Rules
- Is there a plea agreement?

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confirming criminal history?

- If there is a question about a prior conviction, what should you do?

VERIFYING CRIMINAL HISTORY

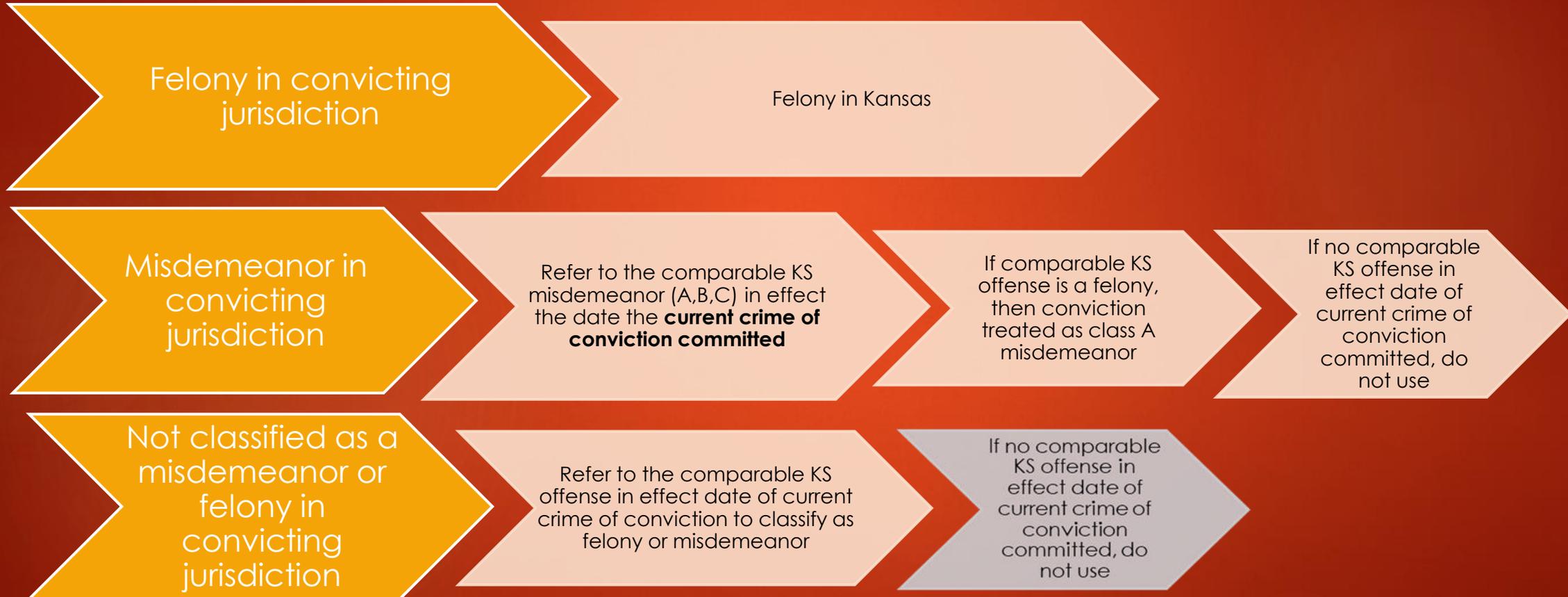
Roadmap: How to classify prior out of state convictions

1. FELONY OR
MISDEMEANOR?

2. PERSON OR
NON-PERSON
CRIME?

OUT OF STATE CONVICTION: FELONY OR MISDEMEANOR IN KANSAS?

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See K.S.A. 2021 Supp. 21-6811(e)(2)

Person felony

- ▶ An out-of-state conviction or adjudication for the commission **of a felony offense**, or an attempt, conspiracy or criminal solicitation to commit a felony offense, **shall be classified as a person felony if one or more** of the following circumstances is present as defined by the convicting jurisdiction in the elements of the out-of-state offense:
 - ▶ (a) Death or killing of any human being;
 - ▶ (b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;
 - ▶ (c) bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree;
 - ▶ (d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance; (e) possessing, viewing, depicting, distributing, recording or transmitting an image of any person;
 - ▶ (f) lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent;
 - ▶ (g) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or
 - ▶ (h) entering or remaining within any residence, dwelling or habitation.

What if the prior
conviction's classification
has changed?

CLASSIFYING PRIOR CONVICTIONS

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The classification of a prior conviction will be made in accordance with the law applicable at the time of the current crime of conviction. See *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).



The Kansas Supreme Court held on February 18th, 2022, that under the KSGA, all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, are to be classified as person or nonperson as of the time the new crime is committed. The Court specifically said, “We conclude that the better understanding of the statutory sentencing scheme requires that all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, be classified as person or nonperson as of the time the new infraction is committed.” *State v. Terrell*, No. 122,680, 2022 WL 497319 at *5 (Kan. February 18, 2022).

prior convictions of criminal threat

- ▶ The Kansas Supreme Court found that the provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear is unconstitutionally overbroad. See *State v. Boettger*, 310 Kan. 800, 801, 450 P.3d 805 (2019).
- ▶ KSSC's belief is that if it can be proven a defendant was convicted of intentional criminal threat, the conviction will count. If it cannot be proven whether a defendant was convicted of reckless or intentional, it cannot be counted.
- ▶ How can this be proven?
- ▶ Case by case basis
- ▶ Issue when jury instructed on both intentional and reckless criminal threat and when the state's argument included both versions. See *State v. Lindemuth*, 470 P.3d 1279 (Kan. August 28, 2020) and *State v. Johnson*, 310 Kan. 835, 450 P.3d 790 (2019).

PRIOR CONVICTION AS SENTENCE ENHANCEMENT OR ELEMENT OF PRESENT CRIME

If a prior conviction of any crime operates to enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, that prior conviction cannot be counted in the offender's criminal history. K.S.A. 2021 Supp. 21-6810(d)(10). Note, however, that prior convictions which elevate the penalty or punishment without raising the severity level of the current crime may be counted for criminal history purposes. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

State v. Pearce

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- ▶ Sentencing for 5th burglary
- ▶ District Court did not include a prior residential burglary in his criminal history score (this conviction had already been used to make the sentence prison instead of probation under recidivist burglar special rule)
- ▶ K.S.A. 21-6810(d)(10): Prior convictions of any crime shall not be counted in determining the criminal history category if they enhance the severity level, elevate the classification from misdemeanor to felony, or are elements of the present crime of conviction. Except as otherwise provided, all other prior convictions will be considered and scored.
- ▶ None of the exceptions listed applied to Pearce, so his prior residential burglary should have been included.
- ▶ See *State v. Pearce*, 51 Kan.App.2d 116, 342 P.3d 963 (2015) (review denied August 20, 2015).

Convictions used for Criminal History & elevate current offense cont'd.

- ▶ Defendant convicted of Possession of Methamphetamine, Violation of Protective Order and Felony Domestic Battery
- ▶ Defendant's two prior misdemeanor Domestic Battery convictions were used to calculate his criminal history for the primary grid conviction (Possession of Meth) as well as to elevate the current Domestic Battery charge from a misdemeanor to a felony
- ▶ Defendant argued this violated the rule against "double counting"

Kansas Supreme Court held that a sentencing judge's use of the same two prior misdemeanor domestic batteries both to calculate a defendant's criminal history for his or her base sentence on a current primary grid crime and to elevate a current domestic battery to a felony does not violate K.S.A. 2015 Supp. 21-6810(d)(9)'s restriction on double counting. *State v. Fowler*, 457 P.3d 927 Syl. ¶ 2 (Kan. 2020).

State v. Williams

- ▶ Defendant had 3 prior person offenses: one conviction for aggravated indecent liberties with a child and two convictions for indecent liberties with a child.
- ▶ PSI writer listed defendant's criminal history as "B", State argued it was "A"
- ▶ District court ruled that criminal history score should be "A" and classified defendant as persistent sex offender
- ▶ The Court of Appeals held that the defendant's prior offense could be used both to calculate his criminal history score and to classify him as a persistent sexual offender because the prior conviction was not used to enhance the severity level of his current offense, it did not change his current offense from a misdemeanor to a felony, and it was not used as an element of his current offense under K.S.A. 2016 Supp. 21-6810(d)(9). See *State v. Williams*, No.121,571, 2020 WL 5849347 at *2 (Kan. App. 2020) (unpublished opinion)(review denied August 10, 2021).

Failure to Register as Offender Convictions

A prior conviction that creates the need for registration as a sex, drug or violent offender is an element of the offense of failure to register and may not be counted in determining the criminal history score on conviction of failure to register. See *State v. Pottoroff*, 32 Kan. App. 2d 1161, 96 P.3d 280 (2004).

Aggravated Escape from Custody Convictions

For a conviction of the crime of aggravated escape from custody (K.S.A. 2021 Supp. 21-5911) that requires that the offender be in custody for a felony, such felony is considered an element of the crime and may not be counted in the defendant's criminal history. See *State v. Taylor*, 262 Kan. 471, 939 P.2d 904 (1997). However, not all alternative means of the crime of aggravated escape require the element of being in custody for a felony. See *State v. Brown*, 32 Kan. App. 2d 24, 80 P.3d 404 (2003).

Tampering with Electronic Monitoring Equipment Convictions

The conviction giving rise to the order requiring the defendant be subjected to electronic monitoring equipment is not an element of the crime of tampering with electronic monitoring equipment and may be counted for criminal history purposes. (K.S.A. 2021 Supp. 21-6322). See *State v. Thacker*, 48 Kan. App. 2d 515, 292 P.3d 342 (2013).

Completing the JE

FAQ

What Journal Entry form should be used?

The date of offense controls selection of the Presentence Investigation (PSI) and Journal Entry (JE) forms. Each year the Kansas Sentencing Commission modifies these forms to comport with the laws and special sentencing rules in effect beginning July 1 of that year. The state operates on a FY, thus, refer to the top of the JE/PSI form to confirm effective date. [KSSC Website has forms for prior years.]

What is the primary crime in a multiple conviction case?

- ▶ Base sentence is established from the primary crime
- ▶ Generally the crime with the highest severity ranking is the primary crime
- ▶ Presumptive imprisonment crime is primary over a presumptive nonimprisonment crime
- ▶ When the offender is convicted of crimes sentenced on nondrug and drug grids, the primary crime is the one that carries the longest prison term. Therefore, in sentencing with the drug grid and nondrug, both crimes having the same presumption of probation or imprisonment, the primary crime shall be the crime with the longest sentence term.
- ▶ See K.S.A. 2021 Supp. 21-6819(b)(2).
- ▶ Reminder: non-base sentences shall be calculated as criminal history level "I." K.S.A. 2021 Supp. 21-6819(b)(3) and (b)(5).

When Primary Crime is Prison

If the sentence for the primary crime is prison, the entire imprisonment term of the consecutive sentences will be served in prison, even if the additional crimes are presumptive nonprison.
K.S.A. 2021 Supp. 21- 6819(b)(6).

State v. Fowler

- ▶ The Primary Offense will be the grid-felony. See *State v. Fowler*, 311 Kan. 136, 143, 457 P.3d 927 (2020).
- ▶ “In a multiple-conviction case, the sentencing judge must “establish a base sentence for the primary crime.” K.S.A. 2018 Supp. 21-6819(b)(2). “The primary crime is the crime with the highest crime severity ranking.” K.S.A. 2018 Supp. 21-6819(b)(2). If there are multiple crimes with the same severity ranking, the district judge must “designate which crime will serve as the primary crime.” K.S.A. 2018 Supp. 21-6819(b)(2). If one or more convictions in the current case are off-grid crimes, those crimes are ignored to determine the appropriate sentences for any grid crimes. K.S.A. 2018 Supp. 21-6819(b)(2). Non-grid crimes that have sentences prescribed by individual statutes also are excluded from grid calculation and thus can never qualify as primary crimes under the KSGA. See K.S.A. 2015 Supp. 21-6804(i).” *Id.*

What should be listed as the primary crime when there is an off-grid and a grid-felony in the same case?

When an off-grid crime is part of a multiple count case, the primary on-grid crime should be used for determining the base guideline sentence, using full criminal history. See K.S.A. 2021 Supp. 21-6819(b)(2). Additionally, if the sentences are consecutive, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and postrelease term is based on the off-grid sentence.

DOUBLE RULE

- ▶ The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence. The postrelease supervision term will reflect only the longest such term assigned to any of the crimes for which consecutive sentences are imposed. Supervision periods shall not be aggregated. K.S.A. 2021 Supp. 21-6819(b)(4).
- ▶ Example: If defendant receives 25 months for the primary offense, and has three additional offenses that have 12 months each and are all consecutive – the grand total number of months (Recap) would be 50 and not 61 (25 + 12 + 12 + 12 = 61). (On Recap Section VII.)

DOUBLE RULE WHEN CONSOLIDATING CASES FOR TRIAL

- ▶ Three sexual assaults on different women, 2 different cases charged
- ▶ Cases consolidated for trial; sentenced separately, base sentence determined for each
- ▶ More specifically, Dixon argues that K.S.A. 2020 Supp. 21-6819(b)(4), commonly known as the “double rule,” violated his equal protection rights in the manner that it was applied to his sentencing following his consolidated trial of two criminal cases. He asserts the double rule treats one class of defendants—those that have multiple counts charged in one charging document—differently from another class of defendants—those that have multiple cases consolidated for trial because the charges could have been brought in one charging document—even though the only difference between the two classes is the number of case numbers attached to the charges.” *State v. Dixon*, 60 Kan.App.2d 100, 130, 492 P.3d 455 (Kan. App. 2021) (rev. denied September 27, 2021).

STATE V. DIXON CONT'D.

- ▶ “Before proceeding with further analysis, we observe that the Kansas Supreme Court has held that under the language of the statute, the double rule does not apply to separate cases that are consolidated for trial under K.S.A. 22-3203. *State v. McCurry*, 279 Kan. 118, 127, 105 P.3d 1247 (2005). But the holding in *McCurry* is based strictly on statutory construction and the constitutionality of the statute was not challenged in that case.” *State v. Dixon*, 60 Kan.App.2d 100, 132, 492 P.3d 455 (Kan. App. 2021) (rev. denied September 27, 2021).
- ▶ Court’s Analysis: (1) double rule treats arguably indistinguishable defendants differently, (2) double rule as applied to Dixon’s cases does not pass rational basis scrutiny and (3) the remedy for the constitutional violation identified herein is to extend the double rule to cases consolidated for trial based on a finding that the charges could have been brought in one charging document. See *id.* 133-140.

DOUBLE RULE WHEN CONSOLIDATING CASES FOR TRIAL CONT'D.

- ▶ 2 cases consolidated for trial
- ▶ Found guilty and judge sentenced him for the cases separately
- ▶ The COA held “...that when the State chooses to consolidate cases for trial because the charges could have been brought in one charging document, then the State must be held to the sentencing limitations—applying only one base sentence—applicable to a trial based on one charging document. See Dixon, 60 Kan. App. 2d at 140, 492 P.3d 455 (reasoning same in relation to double rule).” *State v. Myers*, No. 123,439, 2022 WL 1052077 at *27 (Kan. App. 2022) (unpublished opinion).

REMINDERS FROM THE RESEARCH DEPARTMENT

- ▶ Page 1 of the JE has the PRESUMPTIVE sentencing range. The actual SENTENCE IMPOSED is on Page 2
 - ▶ Don't just copy what's on the PSI, make sure the JE accurately reflects the sentence imposed by the judge!
- ▶ Complete all applicable supplemental pages
- ▶ If Drug Offense, please indicate the name of drug and amount (if distribution) on PSI and JE
- ▶ If probation is imposed, indicate on the JE whether offender is being supervised by Community Corrections or Court Services
- ▶ Fill out the full statute subsections. These are meaningful as they often change the factual nature of the crime.
- ▶ Make sure the proper registration period is selected and that the registration information is filled in if it's a registration crime
- ▶ List reasons for departure – more than just “parties agreed!”
- ▶ Make sure the correct post release period is marked, especially when it is a sex offense that might have lifetime postrelease.



REVISED JE/PV FORMS ON WEBSITE

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QR Codes

Start using from
KSSC's website

Notice and
Information will
be going out
soon!



QUESTIONS?

KSSC RESOURCES

Staff Attorney Contact

- KSSCAttorney@ks.gov

Training

- Francis.givens@ks.gov

KSSC Website

- [Annual Report](#)
- [Data Dashboards](#)